United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

493

No. 21,992

United States of America,
Appellee

v.

John A. Stewart,
Appellant

Appeal from Conviction and Sentence of the United States District Court for the District of Columbia on Charges of Housebreaking, Petit Larceny and Assault on a Member of the Metropolitan Police Department operating in the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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QUESTIONS PRESENTED

I. Were the rights guaranteed Appellant by the Constitution of the United States, violated, and his trial thereby prejudiced, by inadequate, improper and illegal pre-trial identification in the absence of counsel?

II. Was the admission at trial of a prior conviction of Appellant of a violation of the Uniform Narcotics Act repugnantly prejudicial to his rights to a fair and impartial trial?

III. Was Appellant's arrest under charges of petit larceny and assault upon a police officer illegal and void?

IV. Was Appellant's right to due process of the law violated when the transcript of his trial was rendered by a court-appointed reporter, not present at the trial itself, approximately seven months after trial?

(This case has not been previously before this Court)

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 21,992

United States of America,
Appellee

v.

John A. Stewart,
Appellant

Appeal from Conviction and Sentence of the United States District Court for the District of Columbia on Charges of Housebreaking, Petit Larceny and Assault on a Member of the Metropolitan Police Department operating in the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal in forma pauperis from a conviction on charges of Housebreaking, petit larceny and assault on a member of the Metropolitan Police Department operating in the District of Columbia from the United States District Court for the District of Columbia, 28 USC 1291.

STATEMENT OF THE CASE

On or about December 15, 1967, in the general vicinity of 4708 Central Avenue, Northeast, Washington, D.C. a police vehicle, at approximately 11.20 AM, responded to a complaint relayed to it by a dispatcher of the 14th Precinct of the Metropolitan Police Department. A witness for the government, one Randolph

Wilson, residing at 4710 Central Avenue, Northeast, Washington, D.C., appearing under Court Order, testified that a man, after knocking upon the door of 4708 Central Avenue for several minutes, broke a window of that residence and he, Wilson, called the police. The residents of 4708 Central Avenue, Mr. & Mrs. James Jones, upon returning to their house after being notified by one Mrs. Helen Floyd, of a disturbance, discovered that a window had been broken in their house and that a box of coins was missing from the premises. Upon the arrival of officers Clinton Stone and William Rull of the Metropolitan Police Department at 4708 Central Avenue, the appellant was chased by officer Rull who attempted to place him under arrest. A tussle ensued and, assisted by a third officer of the Police Department, one Eli Slanes, the appellant was subsequently arrested by officers Slanes and Rull. A search of the appellant by officer Stone at the 14th Precinct station ascertained that at the time of his apprehension appallent was possessed of $7.94 in coins and a watch.

Prior to his formal arrest by officers Rull and Slanes, appellant was taken back to the vicinity of 4708 Central Avenue for the purpose of identification. The aforementioned witness at trial, Randolph Wilson, at the subsequent confrontation identified appellant as the man who entered the premises of 4708 Central Avenue.

"In court" identification of appellant was made by Randolph Wilson, based primarily upon this pre-trial confrontation, officer Rull, officer Stone, officer Slanes and Helen Floyd.

At the trial, although several witnesses testified that lighting conditions were "daylight", conflicting testimony was heard from Mrs. Floyd, Mr. Wilson, officer Stone and officer Rull as to the dress of the appellant on December 15, 1967, as well as the dress of the alleged housebreaker and person who tussled with officer Rull.

At the trial, Mr. Jones, upon being questioned by the government attorney, was unable to identify coins contained in Government Exhibit No. 1, the coins taken from Appellant upon officer Stone's search of his person.

At the trial evidence was presented that appellant had previously been convicted of violation of the Uniform Narcotics Act.

A transcription of the trial testimony presented on March 25, 1968, not having been made by the court reporter then in attendance, on September 4, 1968, by Order of Edward T. Curran, Chief Judge, one Laura Ruff was employed to transcribe said testimony and her transcript thereof was certified to be the official transcript of the testimony and proceedings in Appellant's case.

ISSUES RAISED ON APPEAL

I. Was appellant denied due process of law in that at the time of the pretrial confrontation with a government witness who testified at the trial only after the issuance of an Order of the court, his counsel was not notified or present?

II. Was appellant denied due process of law and a fair and impartial trial in that evidence of a prior conviction for violation of the Uniform Narcotics Act was introduced by the government?

III. Was appellant's arrest under the charge of petit larceny void, invalid and illegal in that his arresting officer did not have probable cause to believe appellant possessed the "fruits of the crime"?

IV. Was appellant's arrest under the charge of assaulting a police officer void, invalid and illegal in that the officer was not at the time engaged in making a legal arrest?

V. Was appellant denied due process of law in that the transcription of the record of his trial on March 25, 26, 1968, though originally taken by one reporter, was rendered by a different reporter?

SUMMARY OF ARGUMENT

Appellant, John A. Stewart, was denied due process of law in that his rights to counsel under the Sixth Amendment of the Constitution of the United States, was violated by a pre-trial confrontation between Appellant and a witness for the government, who subsequently appeared to offer testimony only under an Order of the Court, without the presence of or notification to Appellant's counsel and subsequent failure to object to in court identification testimony which should have been excluded under rules promulgated in United States v. Wade, 388 U.S. 218(1967), and Russell v. United States, ___ U.S. App. D.C. ___, ___ F.2d.___ (No. 21,571, decided January 24, 1969).

The jury was prejudiced against Appellant by reason of the introduction by the prosecution of Appellant's prior conviction in 1966 of a violation of the Uniform Narcotics Act and, therefore, unable to render a fair and impartial verdict. Jones v. United States, ___ U.S. App. D.C. ___, 402 F.2d 639 (No.21,331 decided July 11, 1968), Weaver v. United States, ___U.S. App. D.C.___, ___ F.2d. ___ (No. 22,172 decided January 22, 1969).

The arrest of Appellant on charges of petit larceny and assault upon a police officer were illegal in that as to the former the arresting officer did not have probable cause to believe Appellant possessed the "fruits of the crime", Smith v. United States, ___ D.C. App. ___, (Nos. 4505, 4506 decided November 12, 1968), and as to the latter arrest probable cause did not exist.

Appellant was denied due process of law in that the transcription of testimony taken at his trial on March 25, 1968, was made by a court reporter other than the one present on those two days.

ARGUMENT

I. APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT HE DID NOT HAVE COUNSEL, NOR WAS HE ADVISED OF HIS RIGHT TO THE SAME, AT THE TIME OF THE PRE-TRIAL CONFRONTATION.

The potential for prejudice in pre-trial, on the scene, identification of an accused is well-recognized. Presence of counsel can often not only avert such prejudice, but also ensure proper in court identification. In the instant case the prejudice likely to result from a pre-trial identification is demonstrated. At the outset it should be emphasized that the governments principal witness, Mr. Wilson, who participated in the pre-trial identification, appeared at the trial only after an Order for his arrest was issued. As the Court has recently said in a case similar to the instant one (i.e. involving convictions for housebreaking and petit larceny), Russell v. United States, supra, at 7, prompt confrontations are permissable only if fairness and reliability will be promoted. Countervailing policy considerations and the factor of time, it is respectfully submitted, present before this Court a case as to which the "hesitation" expressed in Russell, supra, at 8, justifies remand. 1/ As indicated by the transcript, at the time of Appellant's apprehension following the tussle with officer Rull, the scene was confused. The conflicting testimony of the witness Wilson, Mrs. Floyd, and the three police officers respecting Appellant's apparel at the time of his apprehension attest to this. No record was made of the details of Mr. Wilson's confrontation with Appellant, though it may be presumed that Appellant at the time was in the custody of police officers. Mr. Wilson was prejudiced in that he concluded that since Appellant was in the custody of officers, Appellant was the perpetrator of some crime and that, in fact, the officers suspected Appellant and only Appellant of the same. A fair confrontation was thus made impossible. Under the standards set forth in the Wade case, supra, as clarified in the Russell case, supra, and Young v. United States, ___U.S. App. D.C. ___, ___F.2d.___ (per curium) No.

1/ C.F. United States v. Kinnard, Dist. Ct. D.C., Criminal No. 774-68, decided November 4, 1968. Clemous v. United States, ___.U.S. App. D.C. ___, ___F.2d___ (en banc) Nos. 19846-21221-21240, decided December 6, 1968.

21504, decided January 24, 1969, it should be concluded that Appellant's right to counsel under the Sixth Amendment to the United States Constitution was violated in the investigation, arrest and prosecution of Appellant.

II. APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT IMPROPERLY AND PREJUDICIALLY, EVIDENCE OF A PRIOR, UNRELATED CONVICTION NOT SPECIFICALLY AFFECTING APPELLANT'S VERACITY, WAS PERMITTED TO BE INTRODUCED BEFORE THE JURY.

At his trial, evidence was introduced by the prosecution of Appellant's prior conviction in 1966 of a violation of the Uniform Narcotics Act. This evidence was placed before the jury after a bench conference held March 25, 1968, the day prior, part of which was on the record and part of which was off the record. The conference discussed the implications of Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965) and Gordon v. United States, 127 U.S. App. D.C. 345, 383 F2d. 936(1967) with respect to evidence of Appellant's prior conviction. The presiding judge determined that such evidence was permissable.

It is respectfully submitted that in light of the conflicting testimony presented by Appellant on the one hand and government witnesses on the other at Appellant's trial, the lack of a full "on the record inquiry" as contemplated by Luck (Gordon, supra, 127 U.S. App. D.C. at 346, 383 F.2d. at 939), and the obvious need for Appellant's testimony, the instant case presents a "credibility match" much like the one discussed by this Court in Jones v. United States, supra. Here as there, it is submitted, the prejudicial effect of Appellant's impeachment far overshadowed any probative value of the prior conviction to Appellant's credibility. Attention of the Court is directed to statements made by United States Senator Joseph Tydings, Chairman of the Senate District Committee, as reported in the Washington Post in which he stated that narcotics addicts should be confined for treatment and "not released to prey upon society to pay for the dope." In Appellant's case, involving charges of housebreaking and petit larceny, introduction of his prior narcotics conviction prejudiced the jury to the extent that it concluded the alleged housebreak and larceny were committed by the Appellant to feed a narcotics habit. Therefore, Appellant was deprived of a fair and impartial trial

III. APPELLANT'S ARREST ON CHARGES OF PETIT LARCENY AND ASSAULT UPON A MEMBER OF THE POLICE FORCE WERE INVALID AND ILLEGAL.

Appellant's arrest by officer Stone on charges of petit larceny was illegal in that officer Stone, according to the transcript of record, received a dispatch from the 14th Precinct indicating that a housebreaking occurred at 4708 Central Avenue, Northeast. After conversing with the witness Wilson, 2/ officer Stone observed Appellant tussling with officer Rull and subsequently placed Appellant under arrest. At no time prior to officer Stone's search of Appellant at the precinct station does the trial record reflect the slightest suspicion on the part of officer Stone that probably cause existed to suspect Appellant of having committed a petit larceny. Lacking reasonable and probably cause, to believe Appellant was then possessed of the "fruits of the crime", Officer Stone's arrest was improper as a matter of law. Smith v. United States, supra.

The arrest of Appellant on charges of assaulting a member of the police force was likewise impermissable. Officer Rull's testimony as to the tussle with Appellant was that at, legally speaking, the critical moment of the struggle, Appellant's hand was on his, officer Rull's hand, which in turn was on the officer's service revolver. The alleged attempt by Appellant to deprive officer Rull of his revolver formed the basis of the assault charge. Tr. 67,71,71-A. Officer Rull was not the arresting officer. There was in fact no intimidation or interference with officer Rull's duties perpetuated by Appellant. Appellant for reasons unknown to him at the time was being pursued by a police officer. The record is barren of evidence that officer Rull even attempted to explain to Appellant why he, officer Rull, chased him or desired to question him. Having been accosted by officer Rull, however, under such circumstances, Appellant naturally became apprehensive. During the ensuing tussle, it is evident that

2/ Referred to by officer Stone as "Mr. Bill Wilson", Tr. 73.

Appellant had no intent to assault officer Rull. To the contrary, he was concerned that officer Rull intended to assault him.

IV. TRANSCRIPTION OF APPELLANT'S TRIAL TESTIMONY PRESENTED ON MARCH 25, 1968, BY A COURT REPORTER, WHO WAS NOT ON THOSE DATES PRESENT, DEPRIVED APPELLANT OF DUE PROCESS OF LAW.

By Order issued September 4, 1968, nearly seven months following Appellant's trial, Edward J. Curran, Chief Judge, designated one Laura Ruff to transcribe the trial testimony of March 25, 26, 1968, originally taken by one Dorothy Sweet. Said Order prescribed that Ruff's transcription would constitute the official transcript,of the testimony and proceedings. Said transcript indicates at least three different spellings of officer Slane's name, Tr. 6 (Slanes), 68 (Sanes), 80 (Slaines), twice under the testimony of officer Rull. In addition, enigmatic notes appear in the margin of the transcript at pages 71 and 32 which indicate that either Sweet's original notes or Ruff's transcription thereof were uncertain as to accuracy. Since, as noted in the Judge's Charge to the Jury, Tr. 6, 23, conflicting testimony was presented at the trial, in view of the above-referenced inconsitencies and unintelligible marginal notations in the transcript, and the near seven-month delay in transcribing the trial record by a reporter who on the dates of trial was not present, it is submitted that such circumstances prevent assured representation of Appellant in this appeal and, therefore, deprive him of due process of law.

CONCLUSION

Appellant's right to counsel under the Sixth Amendment to the Constitution of the United States was violated in his pre-trial confrontation. Introduction, in the presence of the jury, of Appellant's prior conviction under the Uniform Narcotics Act was prejudicial to a fair and impartial trial. Appellant's

arrest under the charges of petit larceny and assault upon an officer of the Metropolitcan Police Department was unwarranted and illegal for lack of probable cause. Transcription of the trial record is questionable as to accuracy, and its preparation by a court reporter not present at the trial itself, is prejudicial to Appellant's appeal.

Based upon the above, it is submitted that Appellant's conviction should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,592

JOHN A. STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 15 1969

[illegible]

CLERK

Cr. No. 258-68

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* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether there is any need for a remand hearing as to appellant's pre-trial on-the-scene identification by a Government witness where the circumstances show a lack of impermissive suggestivity?

2. Whether appellant rendered a meaningful invocation of judicial discretion under *Luck* and, if so, did the District Judge abuse his discretion in ruling that a prior narcotics conviction of the defendant was available for purposes of impeachment under 14 D.C. Code § 305?

3. Whether appellant has been prejudiced by a seven month delay in the preparation of the trial transcript or its transcription by a court reporter other than the reporter present at trial?

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* This case has not previously been before this Court under the same or similar title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,992

JOHN A. STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on February 19, 1968, on three counts—count 1, for housebreaking (22 D.C. Code § 1801), count 2, for grand larceny (22 D.C. Code § 2201), and count 3, for assault on a police officer (22 D.C. Code § 505), arising out of events which occurred on December 15, 1967. Trial was held before the Honorable Leonard P. Walsh on March 25 and 26, 1968, which resulted in convictions by the jury on counts 1 and 3, and the conviction of the lesser included offense of petit larceny (22 D.C. Code § 2202) which comprised count 2.

On December 15, 1967, at approximately 11:00 a. m. Randolph Wilson, who resides at 4710 Central Avenue, N.E., observed appellant knocking on the front door of the adjacent home at 4708 Central Avenue. When Wilson saw the appellant take a brick and break the front porch window, he called the police (Tr. 54.)

Officers Rull and Stone of the Metropolitan Police Department were on duty the morning of December 15, 1967 and were only a couple of blocks from 4708 Central Avenue, N.E., when they received a radio run of a housebreaking at that address. When they arrived, a minute or so later, Officer Rull went to the rear of the house and Officer Stone stationed himself on the front porch. (Tr. 64.) At this time, Wilson advised Officer Stone that the appellant was still inside the home and Stone related this information to his partner (Tr. 78). While Officer Rull was about to check the side door he noticed appellant running up the steps from the basement of the home. Thereafter a chase developed with Officer Rull in pursuit of appellant. (Tr. 65.) Mrs. Helen Floyd who resides at 4712 Central Avenue, N.E., testified that she saw appellant come out of the basement steps of the Jones residence and further observed Officer Rull commence his pursuit (Tr. 58).

During the course of the chase, Officer Rull called to appellant to stop and fired one warning shot (Tr. 71). Officer Rull testified that he first apprehended appellant at 112 47th Street, about one block from the chase's initial starting point. However, appellant broke away and started to run across 47th Street. In the middle of the street Officer Rull caught up with appellant and pushed him across the street to the southeast corner of 47th and Blaine Streets. Thereafter a tussle developed with both Officer Rull and appellant falling to the ground. During the struggle, appellant placed his hand on Officer Rull's revolver in an attempt to try and extract it from the officer's holster. Officer Rull was able to repell appellant's effort by pushing appellant's hand down upon the holster. (Tr. 67.) The later event was viewed by Officer Stone as

he reached the scene of the struggle (Tr. 80). At the same time Officer Eli Sanes, who was responding to the same radio run, appeared and assisted Officer Rull in subduing appellant and making the arrest (Tr. 68, 84). Officer Rull testified that the chase lasted no more than four minutes and took place within a one block area (Tr. 71). During that time, Officer Rull was in close pursuit and never lost sight of appellant (Tr. 66).

Subsequent to the arrest, Officer Rull searched appellant. He found change in the amount of $7.94 and a gold watch with the stem missing. Among the change taken from appellant's person were several old coins. (Tr. 75, 76.)

The Government also called Mr. James Jones and his wife, Mrs. Bessie L. Jones, occupants of the home at 4708 Central Avenue, N.E. Mr. Jones testified that he returned home from work after being notified of the housebreaking (Tr. 32). He went upstairs to the bedroom and noticed that a box of coins had been taken from his drawer (Tr. 33). Mr. Jones identified certain coins which were found on the appellant as among those missing (Tr. 36). Mrs. Jones testified that a gold watch had been taken from her dresser (Tr. 48). She identified the watch obtained from appellant as hers. Her identification was based upon the watch's missing stem. (Tr. 49.)

After the close of the Government's case, counsel and the court discussed the availability of appellant's record of five prior convictions for purposes of impeachment (Tr. 87-90). The trial judge ruled that appellant's two prior narcotics convictions could be used, but that appellant's two prior housebreaking convictions (one of which was on appeal) and a prior grand larceny conviction could not be used for impeachment (Tr. 89, 90).

Thereafter the defense presented Minerva Stewart, appellant's wife (Tr. 94-100), and appellant testifying in his own defense (Tr. 100-112). Appellant denied being in the Jones residence or removing property or coins therefrom (Tr. 105). He testified that he had purchased the watch in question new, and had given it to his wife a year

and half ago. He was carrying it for the purpose of having the stem fixed. (Tr. 101, 103, 110.) With respect to the coins, appellant testified he obtained them at an auction and was carrying them for the purpose of ascertaining their present value (Tr. 102, 103). Appellant further testified that on December 15, 1967, he was on his way to obtain some fabric for an upholstery job he was working on (Tr. 104, 107). Enroute, he cut through the alley behind 4708 Central Avenue, N.E. When appellant came out of the alley he heard someone screaming and saw several teenagers running. He continued to walk down the street until he was pushed by Officer Rull. (Tr. 104.) On cross-examination Government counsel asked appellant, "Are you the same John Alfonso Stewart who was convicted of Uniform Narcotics Act violation in 1966?", to which appellant answered, "Yes" (Tr. 111). At that time, defense counsel noted no objection on the record.

Appellant's wife, Minerva Stewart, testified that appellant was a coin collector, having some coins dating back into the 1700's (Tr. 98). She further testified, that appellant bought the watch in question for her about six years ago (Tr. 96).

On rebuttal the Government recalled Mr. James Jones who testified that the watch in question was bought second hand some fourteen or fifteen years ago (Tr. 113).

STATUTE INVOLVED

Title 14, District of Columbia Code, Section 305 provides:

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole

record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

ARGUMENT

I. Appellant's identification by Mr. Wilson at the scene of the offense was not in violation of any of appellant's constitutional rights.

(Tr. 3, 35, 71)

Appellant contends that Mr. Wilson's on-the-scene identification without counsel's presence, was made in impermissibly suggestive circumstances and seeks remand under *Stovall* v. *Denno*, 388 U.S. 293 (1967) and *United States* v. *Wade*, 388 U.S. 218 (1967). The Government submits that the identification was proper as it falls within the immediate on-the-scene identifications previously upheld by this Court against *Stovall* attacks.[1]

Preliminarily, we note that defense counsel did not challenge Wilson's identification by way of a motion to suppress before or during trial. Nor did defense counsel bring out the facts surrounding that identification on cross-examination.[2] Nevertheless, from all that appears, the identification, occurring within minutes of the witnessed crime, was proper. Although no record was made of Mr. Wilson's on-the-scene identification of appellant, it may be presumed that it was conducted immediately following appellant's apprehension by Police Officers Rull and Sanes.[3] Officer Rull testified that his chase of appellant lasted no more than four minutes and took place with-

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[1] *Wise* v. *United States*, 127 U.S. App. D.C. 279, 281, 383 F.2d 206, 208 (1967), *cert. denied*, 390 U.S. 964 (1968); *Bates* v. *United States*, D.C. Cir. No. 21434, (decided December 13, 1968); *Russell* v. *United States*, D.C. Cir., No. 21571, (decided January 24, 1969).

[2] Reasons for the reluctance to consider *Wade* claims raised for the first time on appeal are stated in this Court's decision in *Solomon* v. *United States*, D.C. Cir., No. 22155, (decided February 12, 1969) (slip. op. 5).

[3] Appellant's Brief, p. 5.

in a one block area (Tr. 71). Accordingly, the instant case, falls within this Court's holdings in *Russell* v. *United States, supra* (slip op. 6, No. 20) and *Bates* v. *United States, supra* (slip op. 3).

In *Wise* v. *United States, supra,* this Court considered the prompt identification of a suspect apprehended immediately after the offense. In holding such to be proper police procedure, the Court said (127 U.S. App. D.C. at 282, 383 F. 2d at 209): "Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability . . ." Thus, absent special elements of unfairness, prompt on-the-scene confrontations do not entail due process violations. No special elements which would render the confrontation unnecessarily suggestive and conducive to irreparable mistaken identification have been voiced by appellant.[4] Accordingly, the Government submits that an "independent source" analysis to determine the reliability of the in-court identification is neither necessary or required.[5]

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[4] Appellant makes much of the fact that a bench warrant was issued for Mr. Wilson's presence at trial (Tr. 3) (Appellant's Brief, p. 5). From the record it appears that Mr. Wilson had been mistaken as to the date of trial (Tr. 35). Appellee is unable to comprehend what relevance the above has to whether an improper identification procedure has been employed. If relevant at all, it would seem this circumstance would relate to the reliability of the identification, and there remotely. Such considerations are relevant to determine whether there was an "independent source" for an identification made at or after an unnecessarily suggestive confrontation. *Clemons* v. *United States,* D.C. Cir., Nos. 19846, 21001, 21249, (decided December 6, 1968) (en banc) (slip op. 9); *Young* v. *United States,* D.C. Cir. No. 21504, (decided January 24, 1969) (slip op. pp. 2, 3).

[5] As this Court said in *Gregory* v. *United States,* D.C. Cir., No. 21089 (decided March 18, 1969) (slip op. pp. 7, 8):

> . . . (T)o determine whether the admission of the identification testimony denied the appellant due process of law . . . our inquiry is helpfully structured by a focus on three distinct questions. First, was the challenged confrontation suggestive? If so, was the suggestive confrontation unnecessary? Finally, *if the confrontation was unnecessarily suggestive,* does it so taint the testimony relating to the . . . in-court identifications to require reversal of the conviction? (Emphasis added)

II. Not having rendered a meaningful invocation of judicial discretion, appellant cannot now attack the trial court's ruling permitting the Government to impeach appellant with a narcotics conviction. In any event, the trial court gave due consideration to the policy underlying *Luck* and properly exercised its discretion.

(Tr. 87-90, 94-100, 111)

The question, which, if any, of appellant's proffered five convictions could be used for impeachment purposes by the Government, was considered by the court and counsel,[6] the court ruling that the Government could use appellant's convictions for violation of the Uniform Narcotics Act (Title 33, D.C. Code, Section 402), and possession of implements of crime (Title 22, D.C. Code, Section 3601) (Tr. 90).[7] While the *Luck* decision[8] called upon the trial court to exercise its discretion in determining whether prior convictions may be used for impeachment, prior thereto, there must be a meaningful invocation of the court's discretion.[9] This Court has held that it will not find an abuse of discretion unless the defendant has demonstrated a peculiar need for his unimpeached testimony. *Evans & Philson* v. *United States, supra; Gordon* v. *United States, supra.* Appellee submits that appellant did not meet his burden of showing a special need for his unimpeached testimony.

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[6] Appellant states that the *Luck* hearing was conducted in part on the record and in part off the record. It is of course "defense counsel's burden to see to it that the record is complete." *Evans & Philson* v. *United States,* —— U.S. App. D.C. ——, ——, 397 F.2d 675, 680 (1968); *Gordon* v. *United States,* 127 U.S. App. D.C. 343, 383 F.2d 936 (1967); *Hood* v. *United States,* 125 U.S. App. D.C. 16, 365 F.2d 949 (1966).

[7] While the trial judge's ruling allowed for the above two convictions, the Government only used appellant's 1966 Uniform Narcotics Act conviction for impeachment purposes (Tr. 111).

[8] *Luck* v. *United States,* 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

[9] *Hood* v. *United States, supra.*

During the *Luck* hearing conducted after the close of the Government case defense counsel made no representation to the trial court as what the defendant's testimony would be or why the court's discretion should be exercised to prohibit the introduction of any prior convictions. *Hood* v. *United States, supra.* On the contrary, the record indicates that defense counsel not only did not object, but actually acquiesced to the use of a conviction for impeachment purposes.[10] Appellant can hardly be said to have presented cogent reasons calling for his unimpeached testimony which are necessary to find an abuse of discretion. *Evans & Philson* v. *United States, supra.* We submit therefore that this Court should treat this case as if the judge's discretion was not meaningfully invoked.

In any event, from all that appears the trial judge gave due consideration to the policy underlying *Luck* and properly exercised his discretion under 14 D.C. Code § 305. As this Court has frequently stated, the statute neither requires nor prohibits the use of the prior conviction, but rather "leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold

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[10] The following is extracted from the *Luck* hearing conducted in this case:

> Mr. Rosen: I do believe the four convictions, if he is permitted to use all four, would have such a prejudicial effect on any possible testimony the defendant might give would outweigh the value of the testimony in this proceeding, or the fact that he is innocent.
>
> What I was going to say, if Your Honor would allow me to use one conviction for impeachment purposes. He is, not clean as a hound's tooth, but four would be detrimental to this case. I do not believe I should permit him to testify under those circumstances.
>
> THE COURT: The possession of narcotics, 2 to 6, isn't it?
>
> MR. FREEMAN: The Uniform Narcotics Act, the misdemeanor, the second would be 2 to 6.
>
> THE COURT: That can be used. (Tr. 88, 89.)

Likewise, no objection was noted by defense counsel at the time appellant was actually impeached by the introduction of his prior conviction (Tr. 111).

in a particular case." *Luck* v. *United States*, *supra*, 121 U.S. App. D.C. at 156, 348 F. 2d at 768; *Davis* v. *United States*, D.C. Cir. Nos. 21723, 21779, 22101, (decided February 18, 1969) (slip op. 6).

Here, as in *Gordon*, the main issue was the credibility of the Government's witnesses and appellant.[11] The issues were: (1) whether Mr. Wilson and Officer Rull's testimony that they saw appellant break into and emerge from the Jones residence was correct or whether the appellant's testimony that he had never been in the Jones' residence was accurate; (2) whether Officer Rull or appellant's testimony was correct with respect to their struggle at 47th and Blaine Streets; and (3) whether the Jones' or appellant's testimony was correct as to the ownership of the coins and watch found on appellant.[12] "[I]n those circumstances there was greater not less, compelling reason for exploring all avenues which would shed light on which of the . . . witnesses was to be believed." *Gordon* v. *United States*, *supra*, 127 U.S. App. D.C. at 348, 383 F. 2d at 941; *Gass* v. *United States*, D.C. Cir., No. 21198 (decided January 29, 1969) (slip op. 12).

The fact that the battleground was credibility was not the only indicia that the trial judge gave due consideration to the policy supporting this Court's decision in *Luck* and properly exercised his discretion. The convic-

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[11] Appellant argues that the instant case presents a "credibility match" much like the one discussed by this Court in *Jones* v. *United States*, —— U.S. App. D.C. ——, 402 F.2d 639 (1968). The circumstances which made the "credibility match" in *Jones* so important arose out of the inadequacies in the Government's case, which was based solely upon a delayed identification by the complaining witness. *Jones*, *supra*, —— U.S. App. D.C. at ——, 402 F.2d at 643. Based upon the record, we submit that the instant case cannot be viewed in that light.

[12] With respect to the later issue, appellant testified to substantially the same version testified to previously by his wife (Tr. 94-100). Detachment of convictions from his testimony would have inflated its weight before the jury. *Brooke* v. *United States*, 128 U.S. App. D.C. 19, 25, 385 F.2d 279, 285 (1967).

tion admitted was only one of five proffered convictions.[13] The trial judge excluded for impeachment purposes appellant's prior convictions of housebreaking and larceny, the same conduct for which appellant was on trial.[14]

Appellant contends that the prejudicial effect of his impeachment far outweighs the probative value of the prior conviction to appellant's credibility.[15] While convictions for certain crimes may relate more clearly to credibility than other offenses,[16] "convictions for crime retain statutorily some degree of relevance to trustworthiness which *Luck* does not automatically dispel." *Brooke* v. *United States, supra,* 128 U.S. App. D.C. at 25, 385 F. 2d at 285; *Gass* v. *United States, supra,* (slip op. 10). While admittedly not so clear,[17] it is submitted that conviction for narcotics offenses, at least those relating to addiction (such as possession of drugs) bears a probative relation to a testifying defendant's credibility, because addicts are usually associated with dishonest (rather than violent)

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[13] In *Payne* v. *United States,* 129 U.S. App. D.C. 215, 392 F.2d 820 (1968), the trial judge permitted impeachment by a narcotics conviction as to a defendant who had acknowledged some 17 earlier convictions. In approving a meaningful exercise of discretion by the trial judge this Court said:

> "By allowing one (or two) convictions he provided some impeachment, but did not unloose a barrage of convictions that could have condemned defendant out of hand as an irremediably hardened criminal." *Payne, supra,* 129 U.S. App. D.C. at 216, 392 F.2d at 821.

[14] As this Court observed in *Gordon,* "where multiple convictions of various kinds can be shown, strong reasons arise for excluding those for the same crime. . . . As a general guide, those convictions . . . should be admitted sparingly." *Gordon, supra,* 127 U.S. App. D.C. at 347, 383 F.2d at 940. Accord: *Gass* v. *United States, supra* (slip op. 11, 12).

[15] Appellant Brief, p. 6.

[16] In enacting section 305, Congress made no distinction between classes of offenses, but merely created the rule of impeachment for those persons who had been "convicted of crime."

[17] *Evans* v. *United States, supra,* —— U.S. App. D.C. at ——, 397 F.2d at 678. Also see *Cobb* v. *United States,* Nos. 4368, 4369, D.C. Ct. App. (Decided April 25, 1969).

criminal behavior. Cf. *Vauss* v. *United States*, 365 F. 2d 956 (D.C. Cir. 1966). As appellant himself, quoting from statements made by United States Senator Joseph Tydings, points out, narcotics addicts should not be released to prey upon society to pay for the dope.[18] Certainly appellant's criminal record supports the proposition that narcotics users steal and commit other dishonest crimes to pay for their habit.

The court's discretion in this case was not meaningfully invoked pursuant to the *Luck* decision, nevertheless, it was exercised with regard to a number of factors. It is submitted that the standards of discretion created in *Luck* and its progeny were properly followed and that it cannot be said on review that the court abused its discretion.[19]

III. Appellant has in no way been prejudiced by the delay in the preparation of the trial transcript or by the fact that transcription was accomplished by a court reporter other than the reporter present at trial.

(Tr. 77-82)

Appellant contends he was denied due process of law because of a seven month delay in the preparation of the trial transcript in this case.[20] Appellee recognizes that the delay in furnishing transcripts is a problem which has frequently disturbed this Court.[21] While appellant's

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[18] Appellant Brief p. 6; The D.C. Crime Commission pointed out that narcotic addicts "shoplift, rob, and burglarize to pay for their habit." Report of the President's Commission on Crime in the District of Columbia 564 (1966).

[19] As this Court has repeatedly emphasized, discretion is to be "accorded a respect appropriately reflective of the inescapable remoteness of appellate review". *Luck* v. *United States, supra*, 121 U.S. App. D.C. at 157, 348 F.2d at 769. See also, *Gordon* v. *United States, supra* 127 U.S. App. D.C. at 346, 383 F.2d 939; *Gass* v. *United States, supra*, (slip op. 10, 11).

[20] Appellant's Brief, page 8.

[21] *Holmes* v. *United States*, 127 U.S. App. D.C. 332, 383 F.2d 925 (1967); *Kinard* v. *United States*, D.C. Cir., No. 21429 (decided February 24, 1969) (slip op. 5).

statutory right[22] to a reasonably prompt receipt of the transcript is not contested by the Government, for appellant to be granted relief by this Court, he must show that the violation of his statutory right has "resulted in an unnecessarily long imprisonment or in some collateral disadvantage". *Blunt* v. *United States*, D.C. Cir., No. 20956, (decided October 2, 1968) (slip op. 12). On May 10, 1968, the trial judge sentenced appellant for two to six years on Count One and lesser, but concurrent sentences, on the remaining counts. Here, as in *Blunt*, appellant has not yet served his minimum sentence. Accordingly, we submit that appellant has suffered no unnecessary detention.[23]

Appellant further contends that he has been prejudiced because the trial transcript was prepared by a reporter who was not present during the trial.[24] As prejudicial grounds, appellant asserts the misspelling of a police officer's name and unintelligible marginal notations (which there are two) in the transcript.[25] Appellee submits that these grounds are insufficient to establish any collateral disadvantage or prejudice in presenting this appeal.[26]

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[22] 28 U.S.C. § 1915.

[23] The trial was held within four months from the date of the offense, and within two months after indictment. This Court has previously held that a trial held within four months after indictment constituted reasonable promptness. *Kinard* v. *United States*, *surpa* (slip op. 5).

[24] While the record does not show why this procedure was employed, we note that the District Court has on previous occasions added temporary reporters in an effort to ease the mounting backlog of transcripts which have been ordered but not prepared. *Holmes* v. *United States*, *supra*, 127 U.S. App. at 334, 383 F.2d at 927.

[25] Appellant's Brief, page 8.

[26] Appellant raises a fourth argument in that his arrest on charges of petit larceny and assault upon a police officer were invalid and illegal. Appellant's argument is wholly without merit. That probable cause existed for appellant's arrest, and thus, justifying the subsequent search incident thereto, is clearly evident. (Tr. 77-82). *Davis & Sams* v. *United States*, D.C. Cir. Nos. 21949, 22208, (decided February 18, 1968) (slip op. 2).

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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